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No. 97-1927

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In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS PAUL W. BERGER AND ERMA R. BERGER

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TABLE OF CONTENTS

Page

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. Factual Background 3

B. The District Court Proceedings 8

C. The Decision By The Court of Appeals 9

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. LAW ENFORCEMENT VIOLATES THE FOURTH AMENDMENT BY ALLOWING THE MEDIA TO JOIN THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY AND TO VIDEOTAPE AND RECORD THE SEARCH FOR PRIVATE PURPOSES AND NOT IN AID OF ANY LAW ENFORCEMENT EFFORT 12

A. Privacy Is The Core Value Of The Fourth Amendment 12

1. The Sanctity Of The Home Is Inviolable ... 13

2. Expectations Of Privacy Are Protected... 14

B. The Fourth Amendment Is Violated When Law Enforcement Exceeds The Clearly Established Constitutional Limitations Of The Search Warrant Requirement 15

TABLE OF CONTENTS – Continued

Page

1. A Search Warrant Is An Express Limitation On Law Enforcement Authority To Conduct A Search 15

2. The Agents Exceeded The Limitations Of The Search Warrant Without Authority... 20

   a. The Search Warrant Did Not Expressly Authorize The Media's Presence 20

   b. Videotaping And Recording By The Media For Private Purposes Was A Search And Seizure That Did Not Serve Law Enforcement Purposes.... 21

   c. Assisting The Media To Videotape And Record The Search Was Beyond The Scope And Authority Of The Search Warrant And Unreasonable 23

3. The Bergers Did Not Grant Consent: The Agents Entered The Bergers' Home Pursuant To Their False Claim That The Court Ordered The Search Of Every Building On The Ranch 28

4. There Was No Exigency To The Search To Imply Any Justification For The Agents' Entry Into The Bergers' Home With The Media..... 30

5. The Plain View Doctrine Does Not Validate The Media's Private Search 31

TABLE OF CONTENTS – Continued

Page

6. Allowing The Media To Videotape And Record At The Berger Ranch Converted The Search Into An Exploratory Search And The Particularized Warrant Issued Here Into A General Warrant And A Writ Of Assistance..... 33

II. QUALIFIED IMMUNITY DOES NOT SHIELD LAW ENFORCEMENT FROM LIABILITY FOR VIOLATING CLEARLY ESTABLISHED FOURTH AMENDMENT LAW BY ALLOWING THE MEDIA TO ENTER, OBSERVE, VIDEOTAPE AND RECORD THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY 35

   A. The Qualified Immunity Standard 35

   B. Fourth Amendment Rights Were Violated 36

   C. Fourth Amendment Rights Were Clearly Established..... 39

      1. The Agents Violated Clearly Established Fourth Amendment Rights 43

      2. The Agents Violated Explicit Federal Statutes Embodying The Constitutional Prohibition Limiting Their Authority To Execute Search Warrants 45

   D. Damages Are Appropriate For Constitutional Violations..... 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abel v. United States, 362 U.S. 217 (1960) 2, 16, 20

Albright v. Oliver, 510 U.S. 266 (1994) 50

Alderman v. United States, 394 U.S. 165 (1969) 24, 25

Anderson v. Creighton, 483 U.S. 635 (1987) 35, 40, 42

Andresen v. Maryland, 427 U.S. 463 (1976) 16, 20

Arizona v. Hicks, 480 U.S. 321 (1987) 31

Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984) 45

Ayeni v. CBS Inc., 848 F. Supp. 362 (E.D.N.Y. 1994) 36, 43, 45, 46, 47

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994) ..... *passim*

Baker v. Howard, 419 F.2d 376 (9th Cir. 1969) 39

Bell v. Hood, 327 U.S. 678 (1946) 50

Berger v. New York, 388 U.S. 41 (1967) 22, 24, 27, 34

Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) 39

Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992) 38, 44

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Bouie v. City of Columbia, 378 U.S. 347 (1964) 41

Boyd v. United States, 116 U.S. 616 (1886) 12, 16, 28

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 35

Bumper v. North Carolina, 391 U.S. 543 (1968) 23, 29

TABLE OF AUTHORITIES – Continued

Page

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 9, 10, 37, 38, 44

Buonocore v. Harris, 134 F.3d 245 (4th Cir. 1998) 38, 44

Burns v. Reed, 500 U.S. 478 (1991) 35

Butz v. Economou, 438 U.S. 478 (1978) 49

Chimel v. California, 395 U.S. 752 (1969) 18

City of West Covina v. Perkins, No. 97-1230, 1999 U.S. LEXIS 507, *20 (Jan. 13, 1999) 50

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 16, 31, 32, 33

County of Sacramento v. Lewis, 118 S.Ct. 1708 (1998) 35

Dalia v. United States, 441 U.S. 238 (1979) 17

Elder v. Holloway, 510 U.S. 516 (1994) 42, 45

Elkins v. United States, 364 U.S. 206 (1960) 12, 49

Fox v. Acadia State Bank, 937 F.2d 1566 (11th Cir. 1991) 45

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 18

Gomez v. Toledo, 446 U.S. 635 (1980) 35

Gouled v. United States, 255 U.S. 298 (1921) 13, 22

Graham v. Connor, 490 U.S. 386 (1989) 18, 50

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 10, 35, 39, 42, 49

Higbee v. Times-Advocate, Inc., 5 Media L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980) 10, 45

TABLE OF AUTHORITIES – Continued

Page

Hoffa v. United States, 385 U.S. 293 (1966) 22, 27
Horton v. California, 496 U.S. 128 (1990).....15, 32, 34
Illinois v. Rodriguez, 497 U.S. 177 (1990)..... 31
Irvine v. California, 347 U.S. 128 (1954)..... 25
Johnson v. United States, 333 U.S. 10 (1948).....14, 16
Jones v. United States, 357 U.S. 493 (1958)..... 18
Kalina v. Fletcher, 118 S.Ct. 502 (1997) 35
Katz v. United States, 389 U.S. 347 (1967) ..... *passim*
Ker v. California, 374 U.S. 23 (1963)..... 18
Lopez v. United States, 373 U.S. 427 (1963)..... 27
Mapp v. Ohio, 367 U.S. 643 (1961).....17, 20
Marron v. United States, 275 U.S. 192 (1927) 16, 17, 18, 21
Maryland v. Buie, 494 U.S. 325 (1990)..... 16
Maryland v. Garrison, 480 U.S. 79 (1987)..... 17
McBoyle v. United States, 283 U.S. 25 (1931) 41
McDonald v. United States, 335 U.S. 451 (1948)....14, 18
Michigan v. Clifford, 464 U.S. 287 (1984)..... 30
Michigan v. Summers, 452 U.S. 692 (1981)..... 22
Mitchell v. Forsyth, 472 U.S. 511 (1985) 40, 42, 44
Moncrief v. Hanton, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984).....10, 45
On Lee v. United States, 343 U.S. 747 (1952) 27
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997) 38

TABLE OF AUTHORITIES – Continued

Page

Parker v. Clarke, 905 F. Supp. 638 (E.D. Mo. 1995) 38
Payton v. New York, 445 U.S. 573 (1980) .. 14, 22, 33, 34
Procunier v. Navarette, 434 U.S. 555 (1978)..... 42
Roe v. Wade, 410 U.S. 113 (1973) 45
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 28
Screws v. United States, 325 U.S. 91 (1945) 40, 41, 43
Sgro v. United States, 287 U.S. 206 (1932) 16
Siegert v. Gilley, 500 U.S. 226 (1991)..... 35
Silverman v. United States, 365 U.S. 505 (1961) ... *passim*
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)..... 13
Soldal v. Cook County, Ill., 506 U.S. 56 (1992).....13, 45
Stack v. Killian, 96 F.3d 159 (6th Cir. 1996)..... 44
Stanley v. Georgia, 394 U.S. 557 (1969)..... 34
Steagald v. United States, 451 U.S. 204 (1981) 33
Swate v. Taylor, 12 F. Supp.2d 591 (S.D. Tex. 1998) 46
The Florida Star v. B.J.F., 491 U.S. 524 (1989)..... 39
United States v. Caceres, 440 U.S. 741 (1979)..... 27
United States v. Gambino, 734 F. Supp. 1084 (S.D.N.Y. 1990) 47
United States v. Jacobsen, 466 U.S. 109 (1984)..... 14
United States v. Lanier, 117 S.Ct. 1219 (1997) 40, 41, 42, 43
United States v. Lefkowitz, 285 U.S. 452 (1932)..... 16
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. On Lee, 193 F.2d 306 (2d Cir. 1951) 12, 22, 27

United States v. Peifer, 474 F. Supp. 498 (E.D. Pa. 1979) 47

United States v. Place, 462 U.S. 696 (1983) 18

United States v. Rabinowitz, 339 U.S. 56 (1950) 18, 20, 34

United States v. Sanchez, 509 F.2d 886 (6th Cir. 1975) .. 47, 48

United States v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1992) 37, 49

United States v. Schwimmer, 692 F. Supp. 119 (E.D.N.Y. 1988) 47

United States v. United States District Court, 407 U.S. 297 (1972) 13, 16, 46

United States v. Warren, 550 F.2d 219 (5th Cir. 1977) 48

United States v. White, 401 U.S. 745 (1971) 22, 24, 26, 27

United States v. Wright, 667 F.2d 793 (9th Cir. 1982) 47

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 38

Walter v. United States, 447 U.S. 649 (1980) 34

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) 13

Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) 36

Winston v. Lee, 470 U.S. 753 (1985) 13, 45

Wong Sun v. United States, 371 U.S. 471 (1963) ... 16, 20, 24

Woodward v. Worland, 977 F.2d 1392 (10th Cir. 1992) 45

York v. Story, 324 F.2d 450 (9th Cir. 1963) 39

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND REGULATIONS

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIX 30, 39

Code of Federal Regulations, Title 28 §50.2(b)(1)-(6) 48

Federal Rules of Criminal Procedure Rule 41 47

Ninth Circuit local rule 30-1.5 3

United States Code, Title 5 §552a 48

United States Code, Title 18

§241 42

§242 ..... 40, 41, 42

§2231 28

§2234 ..... 19, 47

§2236 ..... 19, 47

United States Code, Title 18

§§2510, *et seq* 8

§3105 ..... *passim*

§3109 47

United States Code, Title 42

§1983 ..... 19, 42, 44

The Espionage Act, Title XI, §7, 40 Stat. 217, 229 (1917) (repealed 1948) 46

The National Prohibition Act, Title II, §2, 41 Stat. 305, 308 (1919) 46

TABLE OF AUTHORITIES – Continued

Page

FOREIGN JURISDICTION

Entick v. Carrington, 19 Howell's State Trials 1029 (K.B. 1765) 12

STATE CASES

Anderson v. WROC-TV, 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981) 31, 44

Bell v. Clapp, 10 Johns. 263 (N.Y. Sup. Ct. 1813) 2

Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977) 30

Magenis v. Fisher Broadcasting, Inc., 798 P.2d 1106 (Or. Ct. App. 1990) 31

Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463 (1986) 30

Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980) 31, 45

Rogers v. Buckel, 615 N.E.2d 669 (Ohio Ct. App. 1992) 31

Scott v. Florida, 559 So.2d 269 (Fla. Dist. Ct. App. – 1990) 31

STATUTES

MISCELLANEOUS

3 Charles Alan Wright, *Federal Practice and Procedure: Criminal* §661 (2d ed. 1982) 19

Department of Justice Manual, 1-7.001 at 1-285 (1990-1 Supp.) 48

TABLE OF AUTHORITIES – Continued

Page

N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution*, 100 n.77 (1937) 36

H.H. Rossbacher, T.W. Young, & N.E. Nishimura, *An Invasion Of Privacy: The Media's Involvement In Law Enforcement Activities*, 6 Journal of Financial Crime (Henry Stewart, London, 1998) 49

Heinke & Edelman, *Police and Emergency "Ride-Alongs" – Is Viewer Excitement Worth the Risk?* 8 ENT. L. REP. 3 (1995) 49

BRIEF FOR RESPONDENTS PAUL W. BERGER AND ERMA R. BERGER

Respondents Paul W. Berger and Erma R. Berger (the "Bergers") respectfully respond to the Petition on Writ of Certiorari by Petitioners, Special Agents of the United States Fish and Wildlife Service ("FWS") Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell") and Robert Prieksat ("Prieksat"); and Assistant United States Attorney Kris A. McLean ("AUSA McLean") (collectively the "Government Agents").[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Section 3105 of Title 18 of the United States Code also applies in this case and provides that,

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. §3105.

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[1] Parties to this action also include Turner Broadcasting System, Inc. ("Turner"), Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Robert Rainey ("Rainey"), and Donald Hooper ("Hooper") (collectively the "Media"). Their separate Petition for a Writ of Certiorari is pending.

INTRODUCTION

When the Fourth Amendment to the United States Constitution was adopted by the First Congress in 1789, the Framers of the Constitution and the Amendments could not anticipate the "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."[2] The Framers knew from bitter experience the evils of life unprotected from officers of the central government and private citizens armed with general warrants and writs of assistance. In recognition of the fact that this is a nation of individual liberty, the Fourth Amendment was thus directed at providing the greatest restraint upon the government's intrusion into privacy.[3] The Fourth Amendment was demanded as an indispensable check which "the constitution of the United States, [has] imposed upon the operation of these search warrants, and with the manifestation of a strong jealousy of the abuses incident to them. . . . "[4]

Before this Court is the claim that the Fourth Amendment does not prohibit government agents bringing private persons – the Media – into private homes if a purpose of their presence is to allow observation and recording of the agents' activities in execution of a warrant. The warrant authorized by the Fourth Amendment is transformed from a limited license granted only to law enforcement officers restricted, not only as to the persons and places to be searched, but also as to the persons and things to be seized – into a *writ of assistance* for the press to obtain observations and recordings of private places, persons and occurrences, papers and property – and a *general warrant* sanctioning the observation and recording by the press of the place searched, the person and things seized, the personal indignities incident thereto and anything else the press may find of interest. The claim is that this government action is reasonable and that the people

[2] *Silverman v. United States*, 365 U.S. 505, 509 (1961).

[3] *Abel v. United States*, 362 U.S. 217, 237 (1960).

[4] *Bell v. Clapp*, 10 Johns. 263, 266 (N.Y. Sup. Ct. 1813).

subjected to these indecencies remain "secure in their persons, houses, papers and effects."

No right of privacy is violated? The guarantee by the Constitution of this essential liberty is unimpaired? The claim denies the Fourth Amendment any meaning, traducing the American Revolution into a corporate reorganization whose purpose was to facilitate press coverage of law enforcement theatricals. The claim is conflated with a flat *denial* by the law enforcement agents that the right of the people to be protected from government officials misusing their exclusive access to search and arrest warrants to facilitate press intrusions into the privacy and security of the people was manifestly included within core Fourth Amendment protections. As shown below, these claims are inimical to a free society and unsupported by the Constitution. The "strong jealousy of the abuses" of warrants and writs of the Framers produced in the Fourth Amendment the ultimate refutation of these claims.

STATEMENT OF THE CASE

A. Factual Background

In early 1993, the Media contacted Government Agent Scrafford and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation.[5] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings which the Media intended to and did repeatedly broadcast

[5] J.A. 44:¶¶34-36, 90, 97:¶¶18-20; R. 2:¶2, 8/7:36:5-25. Citations are to the (1) Joint Appendix ("J.A. [at page(s):paragraph]"); (2) Petitioner's Appendix To Petition For A Writ Of Certiorari ("P.A. [at page(s)]"); or (3) the Excerpts of Record ("R. [tab number/exhibit number and/or page and/or paragraph number within the tab]") pursuant to Ninth Circuit local rule 30-1.5.

worldwide on their various television outlets.[6] The Media, in turn, granted the Government Agents' express desire to publicize their personal efforts to enforce environmental laws.[7]

A week later, a United States Magistrate Judge issued sealed search and seizure warrants but was neither advised of the Agreement nor of the Media's pre-arranged plan with the Government to join, videotape and record the search.[8] The search warrant only authorized a search of "The Paul W. Berger Ranch with appurtenant structures, *excluding the residence*." (emphasis added) J.A. 92:¶7, 97:¶28.

In the early dawn of March 24, 1993, the Government Agents integrated the Media into the Government convoy of vehicles before the search of the remote Berger Ranch commenced.[9] With the Government Agents' assistance, the Media video and audio taped the convoy both from inside a Government vehicle and from a camera mounted on the exterior of another Government vehicle driven by Government Agents. J.A. 97:¶34; R. 8/8:T6:2-T7:2. Agent Scrafford was also fitted with a hidden Media microphone, broadcasting solely to a media recorder. J.A. 92:¶¶5-6, 97:¶37.

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[6] P.A. 4a-5a; J.A. 44:¶¶34-40; 90, 97:¶¶1, 18-24, 34-50, 68, 69; R. 5/A, 8/1. Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[7] J.A. 90, 131; R. 8/8:T11:7-8. "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." R. 8/8.

[8] R. 8/3, 8/4; J.A. 44:¶¶47-48, 97:¶¶25-27.

[9] R. 8/8:T6-T7:2. The Media were also permitted by the Government Agents to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. J.A. 44:¶¶49-52, 97:¶¶29-33, 131; R. 8/8T1:3-4, T3:1-5, T:1-6. The Media were made privy to confidential information about the Bergers and the criminal investigation against Mr. Berger, including details about the sealed warrants and their execution. In addition, AUSA McLean agreed to give the Media an "exclusive" interview on the Berger Ranch during the search. J.A. 131.

Media cameras were focused on Mr. Berger as he came upon the Government convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. J.A. 92:¶¶2-3; R. 8/8:T7:2. Mr. Berger was not given a copy of the search warrant. He was told by Agent Scrafford that a search warrant was about to be executed at his Ranch. *Agent Scrafford falsely told Mr. Berger that the Court had ordered a search of every building; he was not told that the residence was excluded from the search.*[10] Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[11] Mr. Berger complied. J.A. 92:¶5; R. 8/8:T7:1-16. *Agent Scrafford informed Mr. Berger that he would be imprisoned, "run . . . down to the lockup in Billings," if he did not cooperate with the federal authorities.* R. 8/8T:3. Mr. Berger was shaking and very upset. J.A. 92:¶17; R. 8/8:102:13-15.[12]

The Government Agents knew that the Media could not lawfully enter the Berger Ranch. While Agent Scrafford would later testify at the criminal trial that he advised the Media that they could not enter the Berger Ranch during the search, on the day of the search, he and the other Government Agents facilitated the Media's entry onto the Berger Ranch

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[10] J.A. 92:¶¶4, 7, 97:¶36. Agent Joel Scrafford to Mr. Berger: "we've been ordered by the court to search every building that you have here – and check your pastures for poison." R. 8/8:T7:6.

[11] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had been brought against Mr. Berger at the time of the search. R. 8:¶8; R. 8/3, 8/4.

[12] In 1993, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. J.A. 92:¶17.

and into their residence.[13] The Media were allowed to enter the Berger Ranch when the search commenced and proceeded to videotape and record without limitation. The Government Agents and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. R. 8/8:T8:13.

The Bergers were never advised that the Media had entered the Ranch with the aid of the Government Agents and were videotaping and recording the search on the Bergers' land and in the various buildings. J.A. 92:¶¶5, 6, 8, 10-13, 18; R. 8/8:T8:13. The Bergers believed that the Media were Government Agents as they were all dressed in "street" clothes like the Agents and were indistinguishable from the law enforcement personnel. J.A. 92:¶¶11, 12; R. 8/8:T6:3.

The Bergers never knew that Agent Scrafford was the Media's human "boom mike" as he wore the hidden Media microphone which allowed the Media to secretly monitor and record everything being said solely for the Media's benefit. J.A. 92:¶¶5-6, 97:¶37. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. J.A. 92:¶¶5, 10; R. 8/8:T8:13. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. J.A. 92:¶¶5, 8-13, 97:¶¶37, 38, 41-42; R. 8/8:T7:1-16. Mr. Berger was never advised of any of his rights, including the right to remain silent. J.A. 92:¶¶9, 14, 97:¶¶39, 40; R. 8/8:T7:1-16. His concise affidavit is reproduced at pages 92 through 96 of the Joint Appendix.

Although the Berger residence was excluded from the search warrant, Agents Scrafford and Branzell repeatedly entered the Bergers' home and brought the Media inside each

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[13] R. 8/7:37, 115; R. 8/8:T7:15-26. The testimony was given at a time when the media recordings were not available to the defense nor was the Agreement.

time through the hidden microphone.[14] Unbeknownst to the Bergers, their conversations were secretly monitored and recorded by the Media. J.A. 92:¶¶5, 6, 8, 10-13, 18; 97:¶48; R. 8/8:T7:15-16. Mrs. Berger was in the house. In March 1993, she was 81 years old and also recently hospitalized in ill health. J.A. 92:¶17.

Government Agents helped the Media set-up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search.[15] Many videotaped excerpts

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[14] The Agents did not have consent to enter the Berger home and entered after Mr. Berger had been informed that every structure on his Ranch was covered by the Warrant and that he would be imprisoned if he did not cooperate. J.A. 92:¶¶5-6, 97:¶¶45-46. Agent Scrafford's testimony:

> Q. And yet you (Scrafford) went with him (Mr. Berger) everywhere he went that day, did you not?
> A. Yes, sir.
> Q. And at one point did you follow him into the house?
> A. Every time he went in the house, yes, sir.
>
> * * *
>
> Q. When you talk about going inside the house, I take it you didn't have a search warrant for the interior of the house did you?
> A. No, sir, I didn't.
> Q. Did you ask Mr. Berger for permission to go inside his house?
>
> * * *
>
> A. (No response.)
> Q. Did you ask Mr. Berger for permission to go inside his house?
> A. No, sir.

R. 8/7:115:7-116:4.

[15] J.A. 131; R. 8/5, 8/8:T11:2-8. The Media filmed on-camera interviews of the Agents and AUSA McLean made at the Berger Ranch. During one lengthy interview, AUSA McLean made disparaging and personal remarks about Mr. Berger. AUSA McLean met with the Media numerous times during his confidential investigation and made confidential disclosures. J.A. 44:¶¶35-44, 51-54, 74, 75; R. 8/8:T11:7-8.

or "outtakes" of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." J.A. 131; R. 8/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles. *Id.* In addition, a few days before Mr. Berger's sentencing on the misdemeanor count, Agent Hanlon sent a letter on official Government stationery to "[a]ll participants in the Paul Berger (INV.4506AO) eagle poisoning investigations" announcing the broadcast schedule for the "Ring of Death" on Turner and CNN programs, "Earth Matters" and "Network Earth" and proclaiming:

> the Paul Bergers and non-believers of the world will have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD . . . Japan, Chile, France, and every place in between.

R. 8/10. CNN and Turner channels broadcast the segment nationally and internationally at least ten (10) times through April 1994. R. 8/8T12:1-3; 8/9:4. It may still be being broadcast somewhere in the world today.

B. The District Court Proceedings

The Bergers filed two related civil actions against the Government and Media in the United States District Court in Montana under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§2510, *et seq.*), state common law, for declaratory and injunctive relief and monetary damages. On February 26, 1996, *without discovery*, the district court entered an order and judgment granting summary judgment on

all counts of the Complaint in favor of the Government and Media. P.A. 27a-47a. The district court adopted the Government's characterization of the "right" asserted by the Bergers. The district court erroneously decided the Government did not violate the Fourth Amendment in allowing the Media to enter private property under the authority of a search warrant to "observe" the Government execute the warrant.[16] The Bergers' Notice of Appeal was timely filed on March 5, 1996. R. 11.

C. The Decision By The Court of Appeals

By unanimous decision, the Ninth Circuit held that the Bergers' Fourth Amendment rights were violated by Government Agents utilizing a federal search warrant to authorize the Media's entry onto the Bergers' private Ranch and into their home and reversed the district court. The Ninth Circuit recognized that at the time of the search in March 1993, the Fourth Amendment violation was "clearly established" law, relying on *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994) (the law was "clearly established" in March 1992 that government officials cannot permit the media onto private property during searches), *cert. denied*, 514 U.S. 1062 (1995), *aff'g Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (the law was "clearly established" in November 1992 that law enforcement cannot use a search warrant to facilitate private searches); and 18 U.S.C. §3105 (prohibiting "any persons,

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[16] P.A. 36a. Mr. Berger's motion to suppress evidence for lack of probable cause was denied (R. 5/G) even though statements *he* (not Mrs. Berger) made to federal agents violated his *Miranda* rights, the search warrant was stale (based on two-year old information) and property in the warrant was improperly described. J.A. 33; R. 8:¶9. The trial court denied Mr. Berger an opportunity to investigate the extent of the Media's participation and any discussion of the Media during that suppression hearing, "was limited to our attempts to discover whether there was a written agreement between CNN and the Government, and whether videotapes existed, nothing more. . . . " R. 8:¶10.

other than law enforcement personnel and those assisting them, from executing search warrants"). P.A. 10a-12a.

The Ninth Circuit properly refused to rely on the older, lower court decisions relied on by the district court and by the Government, as inapposite and non-controlling. *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984). P.A. 35a. The Ninth Circuit noted that those cases did not involve the Media "as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." P.A. 12a-13a.

As to the Government Agents' conduct, the Ninth Circuit properly applied this Court's standard for qualified immunity in reversing the district court and holding that the Agents were not immune from suit. P.A. 10a-11a (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The court concluded that "no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." P.A. 10a-11a (citing *Ayeni v. Mottola*, 35 F.3d at 686; *Buonocore*, 65 F.3d at 356; 18 U.S.C. §3105). According to the Ninth Circuit, it was compelled to "heed its strictures on the potential abuse of law enforcement powers" in applying the Fourth Amendment because:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

P.A. 9a-10a.

SUMMARY OF ARGUMENT

This case does not present a novel concept of Constitutional law. The Fourth Amendment limitation on Government intrusions into privacy has been a core value of the United States Constitution for more than two hundred years. Indispensable to protecting that fundamental right is the search warrant requirement. Limiting the scope of a search warrant as particularized is mandated; only executive officers authorized by the warrant may lawfully invade privacy. The Constitutional limitations as they apply here have been clearly established for decades.

This case involves a failure to heed the Constitutional limitations of the search warrant requirement. There is nothing that the Agents did not or could not know about obtaining and executing a search warrant in March 1993. The search of the Berger Ranch should have been conducted within the clearly established limits of the Fourth Amendment, but it was not. AUSA McLean – in charge of the confidential criminal investigation of Mr. Berger – executed a secret contract with the Media allowing the Media to join the Agents in executing a sealed search warrant on the Bergers' remote ranch. The Media was allowed to videotape and record everything for a television program. This was in direct violation of Section 3105 of Title 18, which makes explicit the Fourth Amendment's prohibition against private persons serving search warrants except when aiding the officer on his requiring assistance.

This case involves conduct that was unreasonable as it exceeded the clearly established limits to which rights can be invaded by law enforcement in the execution of a search warrant. The Agents are not protected by qualified immunity. The conduct by the Government with the Media violated the core principles of the Fourth Amendment and violated the Bergers' rights.

This case asks whether law enforcement violates the Fourth Amendment by allowing private parties onto private property during law enforcement activities and whether law

enforcement is immune from liability if the Fourth Amendment is violated. Resolution of the questions presented is not dependent upon whether courts of lesser jurisdiction have or have not decided the precise issues. Under clearly established Fourth Amendment principles, the answer can only be in the affirmative. Government Agents cannot be allowed to use a search warrant as a "press pass" for the Media.

ARGUMENT

I. LAW ENFORCEMENT VIOLATES THE FOURTH AMENDMENT BY ALLOWING THE MEDIA TO JOIN THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY AND TO VIDEOTAPE AND RECORD THE SEARCH FOR PRIVATE PURPOSES AND NOT IN AID OF ANY LAW ENFORCEMENT EFFORT

A. Privacy Is The Core Value Of The Fourth Amendment

The right to privacy was established by the Framers of the Fourth Amendment more than two hundred years ago with a lineage deriving from old English common law.[17] "At the

[17] *Boyd v. United States*, 116 U.S. 616, 626-630 (1886); *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (K.B. 1765). The late Judge Jerome Frank made the point in more contemporary language:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate – place which is a man's castle.

United States v. On Lee, 193 F.2d 306, 315-316 (2d Cir. 1951) (J. Frank, dissenting); *see also Silverman v. United States*, 365 U.S. 505, 511 n.4 (1961). The Amicus Brief filed concurrently by NASCAT in this case provides an extensive analysis of the historical basis of the Fourth Amendment and the Constitutional rights violated here.

very core of the Fourth Amendment stands the right of a man to retreat into his own home" and there be free from unreasonable governmental intrusion.[18] The fundamental nature of our Fourth Amendment rights has continually been reaffirmed by this Court,

> to be regarded as of the very essence of the constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen.[19]

1. The Sanctity Of The Home Is Inviolable

The principle object of the Fourth Amendment is the protection of privacy from encroachment by government officials.[20] The guarantee of the Fourth Amendment "extends to the innocent and guilty alike . . . [i]t marks the right of

[18] *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992). In *Soldal*, Justice White delivered the opinion of a unanimous Court and reiterated the Court's prior observations in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967), "that the 'principle' object of the Amendment is the protection of privacy rather than property and that 'this shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform.' " *Soldal*, 506 U.S. at 64 (internal citations omitted).

[19] *Gouled v. United States*, 255 U.S. 298, 304 (1921), *overruled in part by Warden*, 387 U.S. at 294; *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

[20] *Soldal*, 506 U.S. at 64 (1992) (citing *Warden*, 387 U.S. at 304); *Winston v. Lee*, 470 U.S. 753, 758 (1985). The Fourth Amendment is enforceable against an officer of the Government for acts conducted under the color of office or authority (*Silverthorne Lumber v. United States*, 251 U.S. 385, 391 (1920)) and against private parties engaged in "state action" with the Government. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971). *Warden* rejected the common-law notion advanced in *Entick* and *Gouled* that a warrant to search or seize was dependent upon a superior government interest in property. *Id.*, 387 U.S. at 302-307.

privacy as one of the unique values of our civilization."[21] While the zone of privacy is protected in a variety of settings, "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms" in the Fourth Amendment.[22] The protected zone of individual privacy encompasses the home and surrounding private property.[23]

2. Expectations Of Privacy Are Protected

The Fourth Amendment right to privacy is implicated when a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (J. Harlan, concurring). This expectation is set forth in the first clause of the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment

> protects two types of expectations, one involving "searches," and the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs where there is some meaningful interference with an individual's possessory interests in that property.

Id. See also Horton v. California, 496 U.S. 128, 133 (1990).

In March of 1993, the Bergers had reasonable expectations of privacy in their home and surrounding areas of their Ranch. Agent Hanlon applied for and the Magistrate Judge issued search and seizure warrants authorizing the search of the Berger Ranch. Obtaining the warrants was a procedural acknowledgement of the expectations of privacy to be protected. J.A. 17-43. To further protect these expectations the Magistrate Judge limited the scope of the search by specifically excluding the Berger residence from the search warrant. J.A. 17, 95:¶18. Without advising the Magistrate Judge, the Agents took the Media onto the Bergers' private property. The Agents took a hidden media microphone repeatedly into the residence. The Bergers' private conversations were monitored and recorded. Their conversations, possessions and property were recorded and photographed. These actions were taken not by law enforcement for evidentiary purposes but by private parties for their undisclosed and unregulated purposes. These are the means by which the Bergers contend that the Agents violated the Bergers' Fourth Amendment rights. J.A. 44-91, 97:¶¶37-48; R. 8/7:37, 8/8:T7:1-26.

B. The Fourth Amendment Is Violated When Law Enforcement Exceeds The Clearly Established Constitutional Limitations Of The Search Warrant Requirement

1. A Search Warrant Is An Express Limitation On Law Enforcement Authority To Conduct A Search

At the core of the Fourth Amendment is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly

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[21] *McDonald v. United States*, 335 U.S. 451, 453 (1948).

[22] *Payton v. New York*, 445 U.S. 573, 589 (1980) (warrant required for arrest inside a home). *See Silverman*, 365 U.S. at 511 (reversing conviction where police placed physically intrusive electronic listening devices within a home); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (warrantless search inside residential hotel room unreasonable). *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 565 (1976) (private dwellings are afforded the most stringent protections of the Fourth Amendment as compared to automobiles).

[23] *See Michigan v. Tyler*, 436 U.S. 499, 504 (1978) (the expectation of privacy protected by the Fourth Amendment "extends beyond the paradigmatic entry of a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of a crime."); *Oliver v. United States*, 466 U.S. 170, 180 (1984); ("curtilage" at common law included property involving "the intimate activity associated with the sanctity of a man's home and the privacies of life.").

circumscribed.[24] The Framers "interposed the warrant requirement between the public and police" to limit that intrusion.[25] The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." *United States v. United States District Court*, 407 U.S. 297, 315-16 (1972).

What is "central to this procedure is an independent control over the actions of officers effecting searches of private premises." *Abel v. United States*, 362 U.S. 217, 252 (1960). As the Court held in *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976), "responsible officials, including judicial officials, must take care to assure that [searches and seizures that may reveal innocuous, private information] are

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[24] *Payton*, 445 U.S. at 582 n.17. This Court has long-recognized that Fourth Amendment protections against government intrusion should be liberally construed. *Boyd v. United States*, 116 U.S. 616, 635 (1886); *see Sgro v. United States*, 287 U.S. 206, 210 (1932) (Fourth Amendment and legislation regulating search warrants should be liberally construed in an individual's favor) (citing *Boyd*, 116 U.S. at 635; *Byars v. United States*, 273 U.S. 28, 32 (1927); *Marron v. United States*, 275 U.S. 192, 196-97 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

[25] *Marron*, 275 U.S. at 196. As a general rule, law enforcement may only intrude on private property with a search warrant issued by a neutral magistrate based on probable cause. *See Maryland v. Buie*, 494 U.S. 325, 329 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (or under a specific exception to the warrant requirement). Probable cause to justify a search must be made by "a *neutral* and *detached* magistrate instead of by the officer engaged in the competition of ferreting out crime." *Johnson*, 333 U.S. at 14 (emphasis in original). "The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' " *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (internal citations omitted).

conducted in a manner that minimizes unwarranted intrusions upon privacy."

To ensure that governmental intrusions remain restricted it has also been clearly established that the warrant particularly describe the persons, places or things to be seized. *See Mapp v. Ohio*, 367 U.S. 643, 647 (1961); *Stanford v. Texas*, 379 U.S. 476, 481 (1965). The scope of a search under "[t]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant."[26] Furthermore, *the express authorization of the warrant – and federal statute – also limit the persons who are authorized to participate in the search and seizure. See* 28 U.S.C. §3105.

Writing for the majority in *Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987), Justice Stevens reiterated the constitutional magnitude of the limitations of the Fourth Amendment stating:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."[27]

While interpretation of the Fourth Amendment has led to the clear establishment of express limitations on the use of warrants, implicit in the first clause of the Amendment is a

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[26] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394-95 n.7 (1971) (citing *Marron*, 275 U.S. at 196 (1927)); *Dalia v. United States*, 441 U.S. 238, 259-60 (1979). Contrary to here, the covert entry to install an eavesdropping device in *Dalia* was affirmed by this Court as reasonable where federal agents obtained a valid search warrant specifically authorizing the electronic surveillance based on an affidavit submitted to the magistrate judge that described the office to be surveilled with particularity. *Id.* at 257.

[27] Justice Butler, writing for a unanimous court in *Marron*, 275 U.S. at 195-96, noted that "[g]eneral searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them . . . As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

recognition that any governmental intrusion must be reasonable. Although the language is general, this Court has long-held that "[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."[28] A "reasonable search" is not to be determined by any fixed formula but is to be resolved according to the facts of each case and is in the first instance for the District Court to determine. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969). In practical terms, the reasonableness of the search or seizure depends in part on how it is carried out.[29]

The most basic constitutional rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically delineated exceptions." *Katz*, 389 U.S. at 357.[30] The *per se* unreasonable rule also applies to seizures "unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1983) (footnote omitted) (citing *Marron*, 275 U.S. 192, 196 (1927).

The Agents' claim is that the Fourth Amendment authorizes the Media, constitutionally uncontrolled actors, entry into the place to be searched. They further claim that these unconstitutionally controlled actors are authorized to search and seize not merely evidence, but anything of interest. These claims are antithetical to the purpose of the warrant requirement.

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[28] *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (Butler, J.); *Ker v. California*, 374 U.S. 23, 33 (1963) (Clark, J.).

[29] *See Graham v. Connor*, 490 U.S. 386, 395 (1989).

[30] The exceptions are "jealously and carefully drawn" (*Jones v. United States*, 357 U.S. 493, 499 (1958)), and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

This Court's Fourth Amendment jurisprudence for over two hundred years has clarified and applied these "rules." The syllogism is simple. The objective of the warrant is property or a person; the reasonable search by particularized warrant is the vehicle. These rules are enforced in several ways against abuse by law enforcement officials: suppression of evidence, criminal liability (*e.g.* 18 U.S.C. §§2234-2236)[31] and civil liability (42 U.S.C. §1983 and *Bivens* actions); in addition, police agencies are subject to public, political control and, if appropriate, condemnation. Presumably their officials, and the governments they are part of, are subject to political repudiation or, at least, exposure for abuses.

What standard governs these media actors claimed to be granted access to private property by the Fourth Amendment? The claim that the warrant also allows the presence of private parties destroys the carefully crafted series of protections central to the structure of the Amendment. What standards are enforceable against the press? Are they held to the limitations applicable to the authorized agents of government? May they film and photograph everything their equipment can see and record everything their equipment can hear? And publish all that they can film and record? May they write about and publish everything that they observe? What sanctions are available should they transgress whatever rules a court, faced as one inevitably will be with abuses, may find reasonable? Is the standard what would be constitutionally reasonable? Or the limitations set forth in the warrant?

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[31] The federal government is strangely reluctant to indict its officers and prosecutors for their excesses in this area. 3 Charles Alan Wright, *Federal Practice and Procedure: Criminal* §661 n.13 (2d ed. 1982):

> Probably the least used of the other statutes are 18 U.S.C.A. §§2234-2236, providing criminal penalties for exceeding authority in executing a search warrant, procuring a search warrant maliciously, and searching without a warrant. It was the failure to use statutes such as these that made the exclusionary rule seem necessary.

It is preposterous to claim that the Fourth Amendment described in the prior opinions of this Court authorizes reporters entry, rather then the restrained "executive officers" described in *Rabinowitz* whose conduct is to be "independently controlled" in *Abel* so that the "unwarranted intrusions on privacy" condemned in *Andresen* may be minimized. Certainly, no opinion of this Court even hints that the Fourth Amendment contains such a licentious permission. This Court did not allow the security of the people to be subject to official "whim or caprice" in *Wong Sun*. How can the Amendment be interpreted to subject the people to the designedly greater intrusions of the press? As amply shown above, the purpose of the Amendment and the decisions of this Court implementing its original intention have been to restrain government conduct and limit its intrusiveness, not to authorize unlimited and uncontrolled access to private parties.

2. The Agents Exceeded The Limitations Of The Search Warrant Without Authority

a. The Search Warrant Did Not Expressly Authorize The Media's Presence

The Magistrate Judge authorized a very specific, particularized warrant limited to:

> Documents, records, coyote getters, cyanide charges, chemicals, livestock, carcasses and wildlife carcasses, including eagles, which would document the taking of wildlife in violation of Federal laws (16 USC §668, 16 USC §703, and 16 USC §1538).

J.A. 17. The warrant was issued to petitioner Rodney C. Hanlon and limited for execution by him as the "Special Agent, U.S.F.W.S. and Any Authorized Officer of the United States." *Id*. As noted above, the residence was specifically excluded.

In accordance with *Mapp v. Ohio*, 367 U.S. 643, 647 (1961), the warrant particularly described the things to be seized. J.A. 17. The Magistrate Judge issued the warrant to a specific federal officer in accordance with the requirement of

Bivens that the warrant limit the officers authorized to participate. *Bivens*, 403 U.S. at 394 n.7. The warrant did not expressly authorize the Media to accompany the Agents and to observe and record the search. Indeed, the Agents concealed from the Magistrate Judge that by pre-arranged plan the Media would join them and video and audiotape the Bergers and their home. J.A. 44:¶¶34-41, 90, 131.

Despite these limitations, the federal officers here claimed the right to enter and, pursuant to that claim, did repeatedly enter the residence. Not content with these violations, these federal officers used their authority to facilitate unauthorized Media persons to enter and roam throughout the ranch and its buildings filming and recording as the Media saw fit. Further, the federal officers facilitated the recording within the residence by the Media of the Bergers' conversations. None of this film or recording was gathered as evidence. Rather, by contract with the United States Department of Justice, "CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage." J.A. 90-91. Thus, there was an explicit Agreement that the Media's presence recording and filming was not for the purpose of gathering the evidence detailed in the warrant. In fact, the footage and the Agreement were withheld from the Bergers during the criminal trial.

A valid warrant does not validate an unreasonable search. *Bivens*, 403 U.S. at 394-395 n.7; *Marron*, 275 U.S. at 196. This conduct was not reasonably necessary to further the restricted purposes of searching for and seizing the specifically identified property listed in the warrant. Therefore, the violation of the Fourth Amendment is clear.

b. Videotaping And Recording By The Media For Private Purposes Was A Search And Seizure That Did Not Serve Law Enforcement Purposes

The Fourth Amendment governs not only tangible items, but extends as well to the recording of oral statements overheard. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

Capturing a conversation by eavesdropping is a search and seizure. *See Berger v. New York*, 388 U.S. 41, 50-52, 58-59 (1967).

Although the government may use an "invited informer" with a surreptitious recording device to obtain information for legitimate law enforcement purposes,[32] the Ninth Circuit held that the invited informer doctrine does not apply here because, *law enforcement authority was used to assist commercial television, not to further law enforcement objectives.* P.A. 15a-16a (emphasis added). The correctness of that finding is beyond dispute.

Law enforcement agents may only exceed the limits of a warrant when they have an implied justification reasonably necessary to further the warrant's purpose. *Michigan v. Summers*, 452 U.S. 692, 704-705 (1981) (reasonable to detain citizen while executing valid warrant for contraband in citizen's home); *see Payton v. New York*, 445 U.S. 573, 602 (1980) (valid arrest warrant carries implied authority to enter suspect's home with reason to believe suspect is within). The search warrant here expressly limited the Government Agents' authority to control the Bergers' property; that limited control cannot be expanded by implication to legitimize the Media's presence. *Summers*, 452 U.S. at 704-705; *Payton*, 455 U.S. at 602.

The deceptive means by which the Agents acted to serve the Media's interests underscores the extent to which the scope of the search warrant was exceeded. This Court has consistently condemned law enforcement who disregard search warrant restrictions simply because they seek to obtain incriminating evidence by deception rather than through a routine search. *See Gouled v. United States*, 255 U.S. 298 (1921). In that case, the government agent gained admission into a criminal suspect's office on the pretext of paying a social visit and while inside surreptitiously seized incriminating evidence that was later used in a criminal prosecution

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[32] *See United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. On Lee*, 343 U.S. 747 (1952).

against the suspect. *Id.* at 305-306. In unanimously concluding that the warrantless search and seizure violated the Fourth Amendment, this Court reasoned:

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Id.; *see also Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968).

This court in *Gouled* answered the Agents' claim. They gained entrance to the Bergers' home by misrepresentation of their lawful authority and by armed force and threats of imprisonment. They gained entrance for the Media by the same means. Thus, the Government Agents violated the Fourth Amendment when they allowed the Media onto the Berger Ranch.

c. Assisting The Media To Videotape And Record The Search Was Beyond The Scope And Authority Of The Search Warrant And Unreasonable

This Court has long recognized that the Fourth Amendment protects against unauthorized law enforcement seizures

of evidence that include not only tangible objects but whatever law enforcement has seen or heard during an unlawful invasion. *See United States v. White*, 401 U.S. 745, 748 (1971); *Silverman*, 365 U.S. at 509. *See Berger*, 388 U.S. at 50-52, 58-59 (in ruling on the constitutionality of a New York eavesdropping statute under the Fourth and Fourteenth Amendments, this Court made clear that capturing a conversation by eavesdropping is a "search" and "seizure").

Conversational privacy is a clearly established Fourth Amendment right that has been protected by this Court for more than thirty years. *Alderman v. United States*, 394 U.S. 165 (1969).[33] In that case, this Court was asked to relate the standards and procedures to the trial court for determination of whether the Government's surveillance violated the Fourth Amendment. *Id.* at 167. In so doing, the Court reaffirmed that the right to conversational privacy under the Fourth Amendment against the "uninvited ears" of law enforcement has been recognized since it decided *Silverman*, 365 U.S. 505 and *Wong Sun v. United States*, 371 U.S. 471 (1963). *Alderman*, 394 U.S. at 171.

Covert entry by law enforcement without a warrant has long been condemned by this Court as a means by which conversational privacy is violated under the Fourth Amendment. While the incriminating statements in *Silverman* and *Wong Sun* were suppressed as fruits of an unlawful physical invasion of private property, this Court found that conversations that are the fruits of an unlawful surveillance should not be treated any differently, noting that, "conversations and property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home." *Alderman*, 394 U.S. at 180. *See Katz*, 389 U.S. 347 (1967) (recognizing a

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[33] This Court's recognition of the protectable nature of private conversations is contrary to petitioners' reliance on the district court's dismissal of the Bergers' private conversations as intangible and thus incapable of seizure. P.A. 43a-44a.

constitutional right of privacy in private premises). In delivering the opinion of the majority of the Court, Justice White reasoned that,

> We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed.

Alderman, 394 U.S. at 175.

Covert entry was the means by which the "uninvited ears" of law enforcement violated the Fourth Amendment in *Silverman*. In that case, police were investigating allegations of an illegal gambling operation in a home in Washington, D.C. *Silverman*, 365 U.S. at 506. With the consent of the owner of the vacant adjoining row house, but without a search warrant, police inserted an electronic listening device (a "spike-mike") through the common wall which became attached to the heating duct of the suspects' house. *Id.* In effect, the "spike-mike" converted the heating duct into a giant microphone. *Id.* at 506-507, 509. Police testimony about the incriminating conversations they heard through the spike-mike resulted in convictions which were upheld on appeal. *Id.* at 506. In reversing the convictions, Justice Stewart, writing for the majority, held that the Fourth Amendment was violated because the

> officers overheard the petitioners' conversations by usurping part of the petitioners' house or office – a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent.

Id. at 511.

In *Irvine v. California*, 347 U.S. 128 (1954), a plurality of this Court held that the police officers' covert entry of the defendant's home without a search warrant or other process to install an electronic bugging device, "flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government." *Id.* at 132.

In this case, the "uninvited ears" and "uninvited eyes" included those of the Media and the rest of the world by means of both a physical invasion of private property and surreptitious surveillance. Unlike law enforcement in *Silverman* and *Irvine* who had a lawful purpose but no warrant and *Dalia* where law enforcement obtained a warrant to eavesdrop, the Government Agents and the Media had *no* lawful purpose to eavesdrop on the Bergers and no warrant authorizing the Media's videotaping and recording. The intrusion into the Berger residence by the Government Agents and the Media was, as this Court characterized the conduct in *Silverman*, by usurpation. J.A. 17-18, 44:¶¶34-48; R. 8/2.

The Government Agents' reliance on an old line of cases under the "invited informer" doctrine does not resolve their problem. Pet. 15. In every case, the government agent or third party informer did not violate the Fourth Amendment because they were all engaged in a legitimate law enforcement purpose.[34] Thus, petitioners' claim that "the Bergers had no Fourth Amendment expectations of privacy that could be violated when Agent Scrafford wore the hidden Media microphone into their residence," under the "invited informer" doctrine and administrative search cases they cite must be

[34] Petitioners' reliance on *United States v. White*, 401 U.S. 745 (1971), does not address the question presented. The government agents conducting a narcotics investigation in *White* did not have a warrant when they eavesdropped on incriminating conversations between respondent White and their informant who wore a hidden receiver in various locations including White's home. *Id.* at 747. White's narcotics conviction was based on the testimony of the eavesdropping agents after the informant could not be found. *Id.* The Court of Appeals reversed on the grounds that this Court's decision in *Katz* prohibits warrantless intrusions of privacy in one's home. *Id.* This Court ruled, however, that because *Katz* was decided *after* the eavesdropping occurred in *White*, the *Katz* decision could not be applied retroactively; thus, this Court was compelled to reverse the Court of Appeals and apply older cases in which warrantless eavesdropping did not violate the Fourth Amendment without a physical intrusion. *White*, 401 U.S. at 750-53.

rejected for the same reasons that the Media's reliance on the doctrine was rejected by the Ninth Circuit.[35]

The "invited informer" doctrine was developed in situations where the government places informers, often with surreptitious recording devices, to obtain information for legitimate law enforcement purposes. *See White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. On Lee*, 343 U.S. 747 (1952). The Ninth Circuit's analysis,[36] like this Court's rationale for ruling in *Silverman*, applies here, that the decision "did not turn upon the technicality of a trespass upon a party wall as a matter of local law" but on wrongful conduct requiring redress:

> It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices

[35] Petitioners' reliance on other invited informer and administrative search cases underscores the Fourth Amendment violation that occurred here. Pet. 15. *See Lopez v. United States*, 373 U.S. 427 (1963) (administrative search by IRS agent); *On Lee v. United States*, 343 U.S. 747 (1952) (government informer invited into suspect's business); *United States v. Caceres*, 440 U.S. 741, 752 (1979) (upholding administrative search at IRS agent's office without mentioning *Katz* or *Berger* where agent failed to obtain prior authorization under IRS regulations). In dissenting in *White*, Justice Douglas expressed his concern that *On Lee* and *Lopez* were products of old common-law notions of trespass as opposed to *Berger* and *Katz*, where the more recent cases emphasize that with few exceptions, "searches conducted outside of judicial process, without prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *White*, 401 U.S. 760-765 (Harlan, J., dissenting). Justice Harlan added in his dissent that *On Lee* is not sound law and disagreed that *Katz* was not controlling. *Id.* at 768-69.

[36] In rejecting the Media's reliance on the doctrine to justify the taping inside the Bergers' home, the Ninth Circuit held that the Media was not shielded from liability and engaged in "state action," stating, "the Bergers had an expectation of privacy in their conversations with Agent Scrafford, and that the [Media] infringed that privacy when they recorded the Bergers' conversations inside the house." P.A. 17a.

> get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

Silverman, 365 U.S. at 512 (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)). Petitioners violated the Fourth Amendment when Agent Scrafford acted as the Media's "boom" mike inside the Bergers' residence, by allowing the Media to videotape and record the execution of the search and by acting as the Media's "spike-mike."

3. The Bergers Did Not Grant Consent: The Agents Entered The Bergers' Home Pursuant To Their False Claim That The Court Ordered the Search Of Every Building On The Ranch

There can be no consent to a search where there is coercion, as where law enforcement officers claim authority to search a home under a warrant, thereby announcing in effect that the occupant has no right to resist the search.[37] In *Bumper*, 391 U.S. at 550, this Court invalidated a search where a homeowner consented to the search only after police claimed to have a valid search warrant. That is precisely what happened here.

The Fourth Amendment requires that two competing concerns be evaluated to determine voluntary consent: (1) the legitimate need for the search and (2) the absence of coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (knowledge of right to refuse is but one factor in determining voluntariness of consent). The facts surrounding the repeated searches of the Bergers' home show not only that there was no legitimate law enforcement need for the Media's presence, but also that the Government agents coerced the Bergers to submit to these searches.

The Government's improper claim of authority under the search warrant to enter the Bergers' home fails to meet the

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[37] *See* Title 18 U.S.C. §2231 imposing severe penalties on one who, "resists, opposes, prevents, impedes . . . or interferes" *inter alia*, with one executing a search warrant.

burden that consent was freely and voluntarily given and not coerced. A search conducted relying upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. *Bumper*, 391 U.S. at 549. The Agents, in seeking to rely upon consent to justify the lawfulness of this search, have the burden of proving that the consent was, in fact, freely and voluntarily given and this burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. *Id.*

Here, Agent Scrafford gained entry into the Berger residence by coercion, not consent. Specifically, he falsely told Mr. Berger that the court had ordered a search of every building on the Ranch, failing to state that the residence was excluded from the search. J.A. 17, 93:¶7, 116:¶36; R. 8/8:T7:6. Moreover, Agent Scrafford threatened Mr. Berger with imprisonment if he did not submit to the federal authorities. R. 8/8T:3. Agent Scrafford has also sworn that he never asked permission for his repeated entries of the residence.[38]

The circumstances presented are consistent with this Court's suggestion in *Bivens* that consent to enter cannot be voluntary when the request is made by federal law enforcement. In that case, Justice Stewart, writing for the majority, noted that when a private person demands entry into another's home, the police can be called to prevent a trespass:

> But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.

Bivens, 403 U.S. at 394-95.

Mr. Berger, old and ill, was shaking and very upset. J.A. 95:¶17. Naturally, he did not deny entrance to his home. To do so would have been extremely foolish in the face of a multitude of armed Agents. Mr. Berger had no knowledge that he could bar the Agents from his home; indeed, he reasonably

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[38] *See* n.14, *supra*.

believed the exact opposite. *See* Berger Affidavit. J.A. 93-95. Under these circumstances, the facts demonstrate clearly that the agents gained admittance to the Bergers' residence under improper assertion of federal authority and that this coercion violated the Bergers' Fourth Amendment rights.

4. There Was No Exigency To The Search To Imply Any Justification For The Agents' Entry Into The Bergers' Home With The Media

The Agents' contention that the presence of the Media was justified as a common law enforcement practice is not supported by the facts or law. Pet. 22-26, 44-46. The Agents rely on *Florida Publishing Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977), to support the Media's presence in Montana under a Florida state doctrine of implied consent by custom and usage invoked during natural disasters or emergencies. Pet. 23. In that case, which the Florida Supreme Court characterized as "a disaster of great public interest," a press photographer was requested by the fire department to take photographs for their investigation of a horrific fire. *Id.* at 918. The Ninth Circuit rejected the Media's reliance on *Fletcher* as widely distinguished by other courts, and noted that there was no disaster here. P.A. 23a-24a. The Agents' reliance on the fire investigation rationale of *Fletcher* was rejected by this Court in *Michigan v. Clifford*, 464 U.S. 287 (1984), where a plurality held that absent exigent circumstance, a warrantless, nonconsensual entry into a private home – even by fire investigators – unreasonably violates expectations of privacy under the Fourth and Fourteenth Amendments. The *Clifford* rationale applies here.

The Agents also rely on a number of other state cases to suggest that the Media's presence was permissible because "in none of these cases was such conduct found to have violated the Fourth Amendment." Pet. 22. However, the Agents inaccurately rely on cases alleging state law claims where the Fourth Amendment was not at issue. *See Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1482-88 (1986) (state constitutional right to privacy was violated when camera

crew entered home with paramedics to film plaintiff's dying husband without her consent); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1981) ("[i]f the media were to succeed in compelling an uninvited and nonpermitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists"); *Prahl v. Brosamle*, 295 N.W.2d 768, 780 (Wis. Ct. App. 1980) (no implied consent by custom and usage to excuse trespass claim against media).[39] The Agents' reliance on these cases does not address the question presented and only underscores the Constitutional dimensions of the wrong that occurred. *See Bivens*, 403 U.S. at 394-95; *Illinois v. Rodriguez*, 497 U.S. 177, 187 (1990) (what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated).

5. The Plain View Doctrine Does Not Validate The Media's Private Search

This Court recognizes that a valid search warrant will not generally validate a search or seizure that exceeds the scope of the warrant unless one of the exceptions applies. *See Coolidge v. New Hamphire*, 403 U.S. 443, 465 (1971); *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Nor will a warrantless search and

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[39] The Agents also cite: *Scott v. Florida*, 559 So.2d 269, 272 (Fla. Dist. Ct. App. 1990) (appeals court expressly refused to address whether television crew infringed privacy but reversed and remanded the drug conviction on other grounds); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106, 1110 (Or. Ct. App. 1990) (dismissal of state privacy claim upheld on grounds that trial court did not err on jury instruction and dismissal of "false light" invasion claim affirmed because one-year limitations period ran before suit was filed); *Rogers v. Buckel*, 615 N.E.2d 669, 671-673 (Ohio Ct. App. 1992) (summary judgment in favor of media reversed as to state invasion of privacy and defamation claims where genuine issues of material facts existed as to falsity of how plaintiff and her children were portrayed for being involved with crack cocaine). *See infra* at Section I.B. 5, 6.

seizure be validated unless one of the exceptions applies. *Coolidge*, 403 U.S. at 465; *Horton v. California*, 496 U.S. 128, 136-37 (1990). The exceptions, however, are "jealously and carefully drawn" and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made the course imperative." *Coolidge*, 403 U.S. at 455 (citations omitted).

The Agents contend that the Media's videotaping and recording of the private images and conversations of the Bergers was permitted under the "plain view" exception to the search warrant requirement. Pet. 16. There has been no showing that this Court's conditions for applying the doctrine have been met to validate the presence of the Media.

This Court has made clear that the "plain view" doctrine applies only when law enforcement have not violated the Fourth Amendment for the intrusion which inadvertently leads to finding incriminating evidence against an accused in plain view. *Coolidge*, 403 U.S. at 466. As explained by this Court, the "plain view" doctrine applies in situations in which "the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Id.* at 465 (citations omitted).

Where police have no warrant, however, but the initial intrusion is lawful, the seizure of items that come into plain view is also legitimate under recognized exceptions to the warrant requirement. *Horton*, 496 U.S. at 135. According to Justice Stewart, writing the plurality opinion in *Coolidge*, plain view alone is never enough to justify a warrantless seizure of evidence. *Coolidge*, 403 U.S. at 468. In addition, a warrantless seizure is valid under the doctrine where (1) the officers are lawfully in a position to observe the items, (2) the discovery of the items is "inadvertent," and (3) it is immediately apparent to the officers that the items are evidence of a crime, contraband, or otherwise subject to seizure." *Coolidge*, 403 U.S. at 466-469. *See Horton*, 496 U.S. at 134-138 (where Justice Stevens writing for the majority held that "inadvertence" is not a necessary condition but affirmed the other conditions set forth by Justice Stewart).

The Agents cannot show that the Media were (1) lawfully on the Bergers' Ranch or inside their residence to observe any items or record conversations or, (2) that what was "immediately apparent" to them was "evidence of a crime, contraband, or otherwise subject to seizure." *Coolidge*, 403 U.S. at 466-69. Thus, the plain view exception cannot apply. The Media's presence and conduct were "outside the judicial process, without prior approval by judge or magistrate, [were] *per se* unreasonable under the Fourth Amendment . . . ." *Coolidge*, 403 U.S. at 454-55; *Katz*, 389 U.S. at 357. The Agents' attempted reliance on plain view alone validates the concern of Justice Stewart in *Coolidge* when he issued the admonishment that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge*, 403 U.S. at 466. Of course, here there was never an intent that the Media would search for or seize evidence or contraband. They were making a television show.

6. Allowing The Media To Videotape And Record At The Berger Ranch Converted The Search Into An Exploratory Search And The Particularized Warrant Issued Here Into A General Warrant And A Writ Of Assistance

This Court has consistently held that absent exigent circumstances or consent, the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. *Steagald v. United States*, 451 U.S. 204, 220 (1981). Protecting the sanctity of the home from the indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment. *Payton*, 445 U.S. at 583. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that

threshold may not reasonably be crossed without a warrant." *Payton*, at 590.[40]

Law enforcement conduct amounted to an unreasonable exploratory search and invasion of privacy in *Walter v. United States*, 447 U.S. 649, 652-653 (1980). This Court's reasoning was based on the opinion by Justice Stewart in *Stanley v. Georgia*, 394 U.S. 557, 569 (1969):

> Even in the much-criticized case of *United States v. Rabinowitz*, 339 U.S. 56, the Court emphasized that "exploratory searches . . . cannot be undertaken by officers with or without a warrant." (citation omitted). This record presents a bald violation of the basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

Walters, 447 U.S. at 653 (citing *Stanley*, 394 U.S. at 571-72).

The unbridled power of the Government crossed the threshold of the Bergers' residence with the Media without a search warrant, without exigency, and without law enforcement purpose. The warrant was used to authorize a Media search of the Ranch and all of its structures. The search warrant was converted by the Agents into both a general warrant and a writ of assistance for the Media.

The scope of the Media's activity could not be controlled and the Media videotaped and recorded every image and sound that the equipment captured. Every sound and image seized by the Media violated the Bergers' Fourth Amendment rights. *See Silverman*, 365 U.S. at 509; *Berger*, 388 U.S. at 50-52, 58-59.

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[40] The evil the Amendment was designed to prevent was broader than the abuse of the general warrant – unreasonable searches and seizures – without a warrant. *See Id.* at 585 n.23. The prohibition against general searches and warrants is based on privacy concerns, which are not implicated when law enforcement has a lawful right of access to an item in plain view and seizes it without a warrant. *Horton v. California*, 496 U.S. 128 (1990).

II. QUALIFIED IMMUNITY DOES NOT SHIELD LAW ENFORCEMENT FROM LIABILITY FOR VIOLATING CLEARLY ESTABLISHED FOURTH AMENDMENT LAW BY ALLOWING THE MEDIA TO ENTER, OBSERVE, VIDEOTAPE AND RECORD THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY

A. The Qualified Immunity Standard

Government officials are entitled only to qualified, not absolute, immunity in *Bivens* actions for damages. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987); *Gomez v. Toledo*, 446 U.S. 635, 639-41 (1980) (the burden of pleading is on the defense). *See Kalina v. Fletcher*, ___ U.S. ___, 118 S.Ct. 502 (1997).[41] Under the qualified immunity standard, government officials performing discretionary functions are not immune from liability for civil damages if their conduct violated a "clearly established statutory or constitutional right of which a reasonable person would have known." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson*, 483 U.S. at 639.

The threshold legal question in a qualified immunity analysis is whether the right allegedly violated is a Constitutional right, as explained by this Court in *Siegert v. Gilley*, 500 U.S. 226 (1991):

> a necessary concomitant to the determination of whether the constitutional right asserted by plaintiff was "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

Id. at 232; *County of Sacramento v. Lewis*, ___U.S.___, 118 S.Ct. 1708, 1714 n.5 (1998).

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[41] Prosecutors who are sued under *Bivens* for conduct not involving advocacy are limited to a qualified immunity defense. *Id.* at 507 (citing *Burns v. Reed*, 500 U.S. 478, 492-96 (1991) (providing legal advice to law enforcement during pretrial investigation); *Buckley v. Fitzsimmons*, 509 U.S. 259, 276-78 (1993) (holding a press conference)).

B. Fourth Amendment Rights Were Violated

As argued above, the conduct at issue violated the Fourth Amendment. The Ninth Circuit properly addressed the threshold question in this case. P.A. 9a-13a. Reversing the district court, the Ninth Circuit held that the Bergers correctly alleged that the Agents "are individually liable for damages caused by their active participation in the commercial television/law enforcement enterprise conducted at the Bergers' ranch" resulting in an unreasonable search and seizure. P.A. 9a-10a.[42] The Bergers have properly established the violation of a Constitutional right because "to be free from official conduct in contravention of the Fourth Amendment – is a federally protected right." *Bivens*, 403 U.S. at 400.[43]

The threshold question was properly addressed in a factually similar case holding a Secret Service agent liable for allowing a CBS camera crew to join a search in a private apartment in March 1992. *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 366-67 (E.D.N.Y. 1994) ("*Ayeni I*"). In that case, the

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[42] In contrast, the Fourth Circuit, sitting *en banc* in *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998) (consolidated here) ignored the threshold analysis and refused to "address whether the officers' conduct was constitutional or appropriate. . . . " *Id.* at 118. In a carefully reasoned discussion of "the core values of the Fourth Amendment," Circuit Judge Murnaghan dissented on the grounds that it was unreasonable for police to allow reporters into the Wilsons' private home without their permission and to photograph them in a state of undress and that the majority ruling converted qualified immunity into absolute immunity. *Id.* at 119-133 (Motz, J., joining in the dissent).

[43] This Court in *Bivens* remarked that, like here, the "Government appears not ready to concede this point." *Id.* at 400 n.3. To confirm the clearly established fundamental nature of the Fourth Amendment right alleged here, this Court noted Lasson's observation concerning Madison's version of the Fourth Amendment was introduced to the House, "the language of the proposal did not *create* the right to be secure from unreasonable search and seizures but merely stated it as a right which already existed." *Id.* (quoting, N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution*, 100 n.77 (1937)).

district court conducted a well-reasoned analysis of the Fourth Amendment and concluded that,

> [i]t would be, arguably, grossly unreasonable for a government agent not to have known that the presence of private persons he invited in, so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant.

Id. at 368.[44] The district court's decision was affirmed on appeal in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) ("*Ayeni II*"), where the Second Circuit added its admonishment that "[a] private home is not a soundstage for law enforcement theatricals." *Id.* at 686; *see U.S. v. Sanusi*, 813 F. Supp. 149, 154-59 (E.D.N.Y. 1992).

The Fourth Circuit affirmed that the correct threshold analysis was conducted in *Buonocore v. Harris*, 65 F.3d 347, 353-57 (4th Cir. 1995) ("*Buonocore I*"), when it refused interlocutory appeal of the denial on summary judgment of a deputy's qualified immunity defense. That case involved a search in November 1992 where law enforcement obtained a federal search warrant for illegal weapons but one of them, a deputy sheriff, invited the security officer for Buonocore's employer to search for allegedly stolen company equipment. *Id.* at 350. In condemning the private search that took place under the imprimatur of the warrant, the district court held that "we have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the

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[44] Judge Jack B. Weinstein characterized the Secret Service agent's conduct as "the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another." *Id.* at 368. Judge Weinstein added that "CBS had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record. The images, though created by a camera, are a part of the household; they could not be removed without permission or official right." *Id.*

warrant." *Id.* at 356.[45] The Fourth Circuit's rationale was based on an examination of common law concepts leading to ratification of the Fourth Amendment to proscribe general warrants and writs of assistance. *Id.* at 353-354.[46]

Fourth Amendment rights were also implicated in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) ("*Bills I*"), when, in August 1987, police invited a company security officer into a residence to conduct a private search and photograph possibly stolen company equipment that were not described in the search warrant. *Id.* at 702-705.[47] Concluding, however, that the determination of whether allowing a private party during a search unreasonably exceeded the scope of the warrant to apply the qualified immunity defense was a jury issue, the Sixth Circuit reversed the directed verdict for the defense and remanded the case. *Id.* at 705. On appeal after trial where the jury returned a verdict for the defense, the Sixth Circuit distinguished *Ayeni II*, arguing that the Second Circuit failed "to define narrowly the right allegedly violated, instead

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[45] The *Ayeni* and *Buonocore* decisions contrast markedly with decisions from the district court and Eighth Circuit. There was no threshold analysis in *Parker v. Clarke*, 905 F. Supp. 638, 642 (E.D. Mo. 1995) ("*Parker I*"), as there were no allegations of "state action." The District Court found that plaintiffs had not alleged any facts showing concerted action between the press and police and also failed to offer any evidence of "any affirmative agreement." *Id., aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997) ("*Parker II*").

[46] *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669-670 (1995) (O'Connor, J., dissenting) (noting that "[p]rohibition of the general warrant was part of a larger scheme to extinguish general searches categorically." (citation omitted)). The Fourth Circuit affirmed the district court's finding that the private search was unreasonable in violation of Fourth Amendment rights. *Buonocore v. Harris*, 134 F.3d 245, 251 (4th Cir. 1998) ("*Buonocore II*") (affirming denial of qualified immunity defense).

[47] The Sixth Circuit affirmed that the security officer's presence was not justified under 18 U.S.C. §3105, as discussed, *infra*. *Id.* at 702.

describing the violation in abstract terms as a Fourth Amendment right to privacy," *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) ("*Bills II*"), and misstated *Ayeni* as holding that officers "may not exploit their role [in executing warrants] for commercial gain." *Id.* at 603.

The Agents contend that the Fourth Amendment does not apply and suggest that even if the Amendment did apply the presence of the Media is justifiable. *See supra* at section I.B. The Agents also rely on old state cases where the press obtained police information from public sources;[48] or where the conduct challenged involves state not federal officials and state law claims, not the Fourth Amendment.[49] *Bivens*, 403 U.S. at 400. Here, as noted above, the Constitution has been violated by the conduct of the Agents.

C. Fourth Amendment Rights Were Clearly Established

The second prong of the qualified immunity analysis requires showing that the constitutional right on which the claim for relief is based was clearly established at the time of the alleged violation. *See Harlow*, 457 U.S. at 818.[50] Qualified

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[48] For example, the Agents postulate that the Fourth Amendment does not apply where law enforcement do not act improperly until *after* executing a valid search or by *later* giving publicity to the press. Pet. 31-32. This view presumes that the Agents acted independently of the Media in time and place, which they did not. The cases cited are thus inapposite. *See Baker v. Howard*, 419 F.2d 376, 377 (9th Cir. 1969) (police report given to radio station after being written and no decision made whether common law privacy claim was alleged).

[49] *See York v. Story*, 324 F.2d 450, 455-56 (9th Cir. 1963) (due process violation alleged under 14th Amendment when police took pictures of victim and circulated among themselves); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (newspaper published name of rape victim after obtaining name from public document). Pet. 32.

[50] In *Harlow*, this Court held that senior Presidential aides were only entitled to qualified immunity under an objective reasonableness test in order to "provide no license to lawless conduct." *Id.* at 818-819. The Court

immunity is a question of law, not "legal facts." *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).[51]

The clearly established standard applicable to qualified immunity cases was recently reaffirmed in *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219 (1997), when this Court clarified the "fair warning" standard applicable to criminal statutes.[52] Stating that the clearly established standard is the adaptation of

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reasoned that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent official should know the law governing his conduct . . . if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." *Id.* at 818-819.

[51] In *Mitchell*, Forsyth sued the Attorney General who, at the request of the President, authorized a warrantless wiretap to investigate threats to national security by Forsyth and his anti-war group. *Id.* at 532-536. The basis of the suit was that one year after the wiretap was placed, warrantless national security wiretaps were held to be unlawful. *Id.* at 515-516 (citing *United States v. United States District Court*, 407 U.S. 297, 322-323 (1972)). This Court, however, ruled that the Attorney General was entitled to qualified immunity because the unlawfulness of warrantless national security wiretaps was not clearly established at the time the wiretap was placed on the grounds that they had been permitted since President Roosevelt first authorized wiretaps of suspected subversives in the 1940's. *Mitchell*, 472 U.S. at 532-536. Petitioners' reliance on *Mitchell* for the proposition that harboring the Media's wiretap was lawful is inapposite. Pet. 40.

[52] In that case, the conviction of a former state judge for sexually assaulting five women in violation of their due process rights under 18 U.S.C. §242 was affirmed on appeal. *Id.* at 1223. The Sixth Circuit, sitting *en banc*, vacated the conviction on the grounds that the constitutional right at issue had not previously been identified by this Court in a case with fundamentally similar facts and, thus, did not give "fair warning" of a violation. *Id.* The combined standard applied by the Sixth Circuit was substantially higher than the clearly established standard applied to qualified immunity based on its interpretation of *Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion). *Id.* at 1225. The Sixth Circuit was reversed for applying too restrictive a standard.

fair warning in the civil context,[53] this Court noted that "the touchstone [of fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 1225-1227; *see Anderson*, 483 U.S. at 639.[54] While recognizing the inherent difficulty of giving fair warning for a due process violation under 18 U.S.C. §242 where the statute does not define the offense, the Court acknowledged that,

> this constitutional difficulty does not arise when the accused is charged with violating a "right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."

Id. at 1225 (citing *Screws v. United States*, 325 U.S. 91, 104 (1945)).[55]

As to decisions interpreting the Constitution or laws of the United States, this Court made clear that its own prior decisions have never been required. *Id.* at 1226. Nor does this Court require precedents that applied the right at issue to a factual situation that is "fundamentally similar" at the level of

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[53] "Fair warning" according to Justice Holmes, should be "in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Lanier*, 117 S.Ct. at 1224 (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (" 'The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' ").

[54] A statutory example of "fair warning" is 18 U.S.C. §3105 which explicitly limits the service and execution of federal search warrants to authorized officers and prohibits the presence of private persons, "except in aid of the officer on his requiring it," and only in the presence of the officer executing the warrant. *See infra* at section II.C.2.

[55] "But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " *Lanier*, 117 S.Ct. at 1227 (citing *Anderson*, 483 U.S. at 640).

specificity meant by the Sixth Circuit. *Id.* at 1227.[56] At a minimum what is required is that:

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of the pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (internal citation omitted).[57] *See Mitchell*, 472 U.S. at 535 n.12.[58]

In applying the rule to a qualified immunity analysis in actions under 42 U.S.C. §1983 and *Bivens*, this Court noted that "we have referred to decisions of the Courts of Appeals when enquiring whether the right was 'clearly established.' " *Lanier*, 117 S.Ct. at 1226; *Mitchell*, 472 U.S. at 533; *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (treating Court of

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[56] Noting to the contrary that this Court upheld convictions under 18 U.S.C. §241 or §242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct at issue violated Constitutional rights. *Id.*

[57] This Court in *Anderson* explained that the inquiry of the objective reasonable test of *Harlow* in a *Bivens* action against an FBI agent for a warrantless search was whether a reasonable officer could have believed that the search comported with the Fourth Amendment even though it actually did not and, reversed the Court of Appeals which granted summary judgment for the agent. *Id.* at 645.

[58] The Agents take *Procunier v. Navarette*, 434 U.S. 555, 562, 566 (1978), out of context as stating the rule for qualified immunity analysis (Pet. 34), and to lament that they "cannot be expected to predict the future course of constitutional law." Pet. 41. The remainder of the statement was omitted that an official cannot be expected to predict the future, "but he will not be shielded from liability if he acts 'with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.' [citation omitted]." *Id.* at 567.

Appeals decision as "relevant authority" that must be considered as part of qualified immunity inquiry).

1. The Agents Violated Clearly Established Fourth Amendment Rights

The law was clearly established at the time of the Berger search in March 1993 based on the express terms of the Fourth Amendment and the decisions interpreting the search warrant requirement. *Lanier*, 117 S.Ct. at 1225 (citing *Screws*, 325 U.S. at 104). *See supra* at section I. Petitioners knew or should have known that private parties – namely, the Media – were prohibited from the execution of the search warrant. Agent Scrafford testified that he told the Media that they should not enter the Berger Ranch during the search but allowed them to enter nonetheless. R. 8/7:37, 115. *See Bivens*, 403 U.S. at 394 n.7.

There were also relevant Court of Appeals decisions on point interpreting the Fourth Amendment. In *Ayeni II*, the Second Circuit affirmed that the Fourth Amendment rights violated here were clearly established in March 1992, one year *before* the Berger search. *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).[59] In conducting the second prong of the qualified immunity analysis, the Second Circuit found that an "objectively reasonable officer could not have concluded that inviting a television crew – or any third party not providing assistance to law enforcement – to participate in a search was in accordance with Fourth Amendment requirements." *Id.* at 686 (referring to the standard in *Anderson*, 483 U.S. at 640, that "in the light of pre-existing

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[59] In *Ayeni I*, the district court (Weinstein, J.) noted that the conduct of the Secret Service agent who allowed a CBS camera crew to videotape and record a search in the Ayeni's apartment was "so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution." *Ayeni I*, 848 F. Supp. at 368.

law the unlawfulness must be apparent."). Denial of the agent's qualified immunity defense was affirmed on the ground that "a private home is not a soundstage for law enforcement theatricals." *Ayeni II*, 35 F.3d at 686.[60]

In addition, the Fourth Circuit held that in November 1992, the Fourth Amendment prohibition against the presence of private parties during searches was clearly established. *Buonocore v. Harris*, 134 F.3d 245, 251 (4th Cir. 1998) ("*Buonocore II*") (affirming denial of qualified immunity defense). *See Buonocore I*, 65 F.3d at 356 (in November 1992 it was "clearly established" that the Fourth Amendment prohibits government agents from using a search warrant to facilitate a private telephone company_ employee's independent search of another's home for items not specified in the warrant).[61]

The Agents contend that district court decisions have upheld their conduct. Pet. 35-39. The older lower court and unpublished decisions they rely on, however, are not "relevant

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[60] The Agents' reliance on *Mitchell v. Forsyth*, 472 U.S. 511 (1985), for the proposition that the Ninth Circuit should not have relied on *Ayeni* and *Buonocore* is inapposite. As expressed by the Ninth Circuit under clearly established Fourth Amendment jurisprudence, "even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." J.A. 11a (citing *Ayeni II*, 35 F.3d at 686; *Buonocore I*, 65 F.3d at 356; 18 U.S.C. §3105).

[61] *See Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1981) (allowing the media to trespass would amount to a "general warrant equivalent to the writs of assistance which were so odious to the American colonists."); *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (the search occurred in July 1991, one year before the Berger search, and Sixth Circuit justified the media's presence during a search on the grounds that the search warrant authorized photography and videotaping); *Bills v. Aseltine*, 958 F.2d 697, 704 (1992) (the issue of whether the search was reasonable was left to the jury and the person who engaged in the private search was not named in the §1983 action).

authority." *See Elder*, 510 U.S. at 516.[62] These cases have no constitutional force and effect as they did not recognize the Fourth Amendment privacy right which this Court has clearly upheld in superseding decisions.[63] The Ninth Circuit rejected reliance on these cases as they did not involve the Media "as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." P.A. 13a.

2. The Agents Violated Explicit Federal Statutes Embodying The Constitutional Prohibition Limiting Their Authority To Execute Search Warrants

In his scholarly opinion in *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 367 (E.D.N.Y. 1994) ("*Ayeni I*"), Judge Weinstein looked to federal statutes as well as case law in holding that the Fourth

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[62] *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Ca. Jan. 9, 1980) (turned on a restrictive characterization of the privacy right violated by the intrusion of the media under a warrant); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) (erroneously held that a constitutional wrong required violation of a *non*-4th Amendment privacy right (*e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973)); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) (issue was limited to whether a reasonable search and seizure, without more, is made unreasonable when the media shows up to film where there is no agreement with or participation of law enforcement); *Avenson v. Zegart*, 577 F. Supp. 958, 962 (D. Minn. 1984) (Fourteenth Amendment claim for equal protection not valid constitutional violation where invidious, class-based discrimination was not and could not be alleged).

[63] *See Winston v. Lee*, 470 U.S. 753, 758-760 (1985) (recognizing that the Fourth Amendment protects expectations of privacy); *See e.g.*, *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (Fourth Amendment protection against unreasonable searches and seizures applies in civil cases even where no invasion of privacy is alleged). *See also Woodward v. Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992) (a district court decision will not ordinarily "clearly establish" the law even of its own circuit); *Fox v. Acadia State Bank*, 937 F.2d 1566, 1577 (11th Cir. 1991) (a district court is not bound by another district court's decision).

Amendment prohibition against the law enforcement-media theatrical that occurred at the Ayeni apartment was clearly established in March 1992. In particular, he looked to 18 U.S.C. §3105, which limits who may serve and execute a search warrant, providing that,

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person, except in aid of the officer on his requiring it,* he being present and acting in its execution.

18 U.S.C. §3105; *Ayeni I*, 848 F. Supp. at 367 (emphasis added).

Judge Weinstein noted that §3105 "was enacted as a codification of the Fourth Amendment requirements for lawful searches and seizures" and that "the wording was used in earlier statutes governing search warrants." *Ayeni I*, 848 F. Supp. at 367.[64] He reasoned that "Congress – as well as the courts and the President – has the power and the responsibility to interpret the Constitution in legislating" and because "Courts assume that statutes effectuating or executing the constitutional mandates were adopted with this obligation in mind", he concluded that "[s]tatutes as well as case law can thus be relied upon in determining whether a constitutional right is clearly established." *Id. See Swate v. Taylor*, 12 F. Supp. 2d 591, 596 (S.D. Tex. 1998) (Congress passed §3105 in 1917 reaffirming the proscription against third persons from accompanying federal officers when not assisting the officer in execution of the search warrant).[65]

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[64] Citing to The National Prohibition Act, Title II, §2, 41 Stat. 305, 308 (1919) and The Espionage Act, Title XI, §7, 40 Stat. 217, 229 (1917) (repealed 1948). The ancient nature of the prohibition embodied in §3105 is delineated in the Amicus Brief filed concurrently by NASCAT at pp. 24-26.

[65] In *Ayeni II*, Chief Judge Jon O. Newman noted that the prohibitions of §3105 may be considered in determining "reasonableness" under the Fourth Amendment as indicated by the similar treatment courts

Section 3105 has been strictly applied in light of its constitutional basis. Thus, in *Ayeni I*, because the CBS camera crew was not requested by the Secret Service to aid in the execution of the search warrant at the Ayeni apartment, Judge Weinstein considered a violation of §3105 as further support that the presence of third parties for private purpose during a law enforcement activity violated a Fourth Amendment prohibition that was clearly established before March 1992. *Id. See Ayeni II*, 35 F.3d at 687.[66]

Other courts have also strictly construed §3105. P.A. 10a-11a. *See Swate*, 12 F. Supp. 2d at 593 (methadone clinic doctor's clearly-established constitutional right to be free from government intrusion violated when federal drug agent acting under authority of search warrant allowed local television crew into clinic); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982) (a state drug enforcement officer asked to assist in the execution of federal drug search warrant); *United States v. Clouston*, 623 F.2d 485, 486-487 (6th Cir. 1980) (en banc) (telephone company employees were authorized by the search warrant to help identify stolen company property). *See also United States v. Gambino*, 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990) (confidential informant assisting search); *United States v. Schwimmer*, 692 F. Supp. 119, 126-127 (E.D.N.Y. 1988) (a private computer expert was authorized by the search warrant to locate computer files); *United States v. Peifer*, 474 F. Supp. 498, 503 (E.D. Pa. 1979) (EPA expert authorized to obtain and test water samples in water contamination investigation).[67] In

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have accorded the requirements of §3109 the "knock and announce" statue. *Ayeni v. Mottola*, 35 F.3d 680, 687 n.9 (2d Cir. 1994).

[66] *See* Title 18, Sections 3109 (knock and announce requirement limits the use of force to enter a private dwelling); 2234 (criminalizes willful exceeding of search warrant authority); 2236 (criminalizes the warrantless search of a private dwelling); and Rule 41, Federal Rules of Criminal Procedure, regulates the issuance and execution of search warrants and provides an additional basis for interpreting the Fourth Amendment's reasonableness requirement.

[67] Other federal appellate cases illustrate the consequences of allowing unauthorized persons during searches. *See United States v.*

every case and those cited by the Government Agents to support their proposition that the presence of third parties during a search is lawful, the private party was specifically present and authorized to assist authorized law enforcement to identify or locate property in which the third party had an interest.

Nor can the Agents justify the presence of the Media under the Department of Justice ("DOJ") policy excerpt attached to their brief, because it would endanger or prejudice a person and it was proscribed by law.[68]

D. Damages Are Appropriate For Constitutional Violations.

An action for damages may offer the only realistic remedy to vindicate constitutional violations by federal officials.

Sanchez, 509 F.2d 886, 889 (6th Cir. 1975) (explosives found during warrantless search by federal Alcohol, Tobacco and Firearms agent suppressed when he entered premises with state police under search warrant for narcotics only); *United States v. Warren*, 550 F.2d 219, 225 (5th Cir. 1977) (evidence found during warrantless search by federal Drug Enforcement Agency agents suppressed based on unauthorized boarding of ship under Coast Guard authority only to make safety inspections).

[68] There are other restrictions on DOJ personnel in relation to the Media ignored in petitioners' brief. DOJ personnel are specifically prohibited from disclosing private facts and confidential information to the media during a confidential investigation, especially "subjective observations" about the character of persons under investigation, or references to investigative procedures, witnesses or evidence, or any opinion as to the person's guilt, where release "tends to create dangers of prejudice without serving any law enforcement function" and "could reasonably be expected to be disseminated by means of public communication." *See* 28 C.F.R. §50.2(b)(1)-(6). The DOJ personnel are under an "obligation to preserve the privacy rights of our citizens, even though they may be under investigation for violation of the criminal laws." *See Department of Justice Manual*, 1-7.001 at 1-285 (1990-1 Supp.) ("Favoritism should be shown to no member of the media"); 1-7.000 (1993 Supp.). The Privacy Act imposes criminal sanctions for the willful disclosure of such information without written consent or court order. *See* 5 U.S.C. §552a. *See* R. 8/5.

Harlow, 457 U.S. at 818; *Butz v. Economou*, 438 U.S. 478, 506 (1978).[69] Petitioners' contention that state common law

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[69] The majority of this Court in *Bivens* noted that "it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court . . . assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 409-10 (1971) (Harlan, J., concurring). *See also* H. H. Rossbacher, T. W. Young, N. E. Nishimura, "*An Invasion Of Privacy: The Media's Involvement In Law Enforcement Activities*," 6 Journal of Financial Crime No. 3, 240 (Henry Stewart, London, 1998) (hereafter "*An Invasion Of Privacy*").

In the *Sanusi-Ayeni* cases Judge Weinstein noted that the Secret Service had defied the U.S. Attorney and taken CBS into the Ayenis' home against the U.S. Attorney's instructions. *United States v. Sanusi*, 813 F. Supp. 149, 161 (E.D.N.Y. 1992). It was later discovered in the *Ayeni* civil case that the Secret Service had valued the benefit of good publicity from CBS so highly that it would risk tainting the evidence to be found in the search by the illegality of its conduct. *An Invasion Of Privacy*, at n.24. It was also discovered that CBS had accompanied the Secret Service on multiple searches of other homes. The exclusionary rule does not appear to deter this conduct as it was intended to do. The rule was enacted to prohibit law enforcement abuse of the warrant and "calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (citation omitted). Two press lawyers have published their advice balancing the small risk of being sued against the large profits to be made from syndicated footage of citizens' humiliation:

> *Finally*, many of those who are filmed while being arrested or searched are eventually charged with criminal activity. Those who are convicted or plead guilty are not likely to sue; if they do, they are unlikely to recover significant sums.

Rex S. Heinke & Susan S. Edelman, *Police and Emergency "Ride-Alongs" – Is Viewer Excitement Worth the Risk?* ENT. L. REP. (Dec. 1995) at 3. This is the cynical attitude to the individual's constitutional rights manifested by the press in these cases.

remedies "or perhaps the Due Process Clause" are sufficient is without merit. Pet. 29-32.[70] According to this Court in *Bivens*, "it is well-settled that where legal rights are invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).[71]

CONCLUSION

For the foregoing reasons respondents Paul W. Berger and Erma R. Berger respectfully submit that the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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[70] A due process claim is not recognized by this Court under the "more specific provision" rule. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). *See also City of West Covina v. Perkins*, No. 97-1230, 1999 U.S. LEXIS 507, *20 (Jan. 13, 1999) (Thomas, J., concurring) (citing *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975)).

[71] The basis for this Court's rationale was that the interests protected by state trespass laws "may be inconsistent or even hostile" with those protected by the Fourth Amendment. *Id.* at 394.